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No. 89-429

IN THE

Supreme Court of the United States

October Term, 1989

THE INTERNATIONAL COMMERCIAL BANK OF CHINA,
Petitioner,

against

NATIONAL BANK OF PAKISTAN,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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The Respondent, National Bank of Pakistan ("NBP"), herewith respectfully submits this brief in opposition to the petition of The International Commercial Bank of China ("ICBC") for a writ of certiorari.

ICBC's "Questions Presented"

None of the four questions ICBC presents in its petition warrant review. The first two are not proper statements of issues in this case and have no relationship to the findings below. The subject decision leaves wholly intact the prior

judgment ICBC refers to, in which the Republic of China and/or its agencies were parties. The decision below did not void or in any manner alter that prior judgment which was collected and satisfied.

ICBC's third question misstates the Foreign Assets Control Regulations' prohibition against certain transfers of assets. The Regulations' provisions apply, by their very terms, only to transactions carried out by persons subject to the jurisdiction of the United States (Record on Appeal "R", 603, 606). The assignment under which NBP claimed title to the funds in dispute was created by an agreement between two foreign sovereign governments and effectuated by two foreign banks, none of which were persons subject to U.S. jurisdiction. ICBC's fourth question likewise misstates the Regulations' scope of applicability, as well as the act of state doctrine, which, in fact, bars a U.S. court from reviewing the propriety and validity of the foreign assignment.

ICBC's questions are thus either irrelevant or based upon incorrect fundamental premises, and, as such, do not offer grounds for review.

Statement of the Case

Legal Statement

This case has a most unique fact pattern which is hardly capable of repetition. The decision below, which rests squarely on those facts, presents no novel or important issue for consideration.

The points of law addressed by the trial judge were so clear and properly handled that no elaboration was required by the Appellate Division, First Department, which unanimously affirmed the order without opinion. ICBC then moved the Court of Appeals, New York's highest court, for leave to appeal on the alleged ground that the same issues it

now raises herein were of "public importance." The Court of Appeals found none of ICBC's alleged issues to be of any significance.

Factual Statement

In consideration of the friendly relations and cooperation offered by the Government of Pakistan to the People's Republic of China ("PRC"), the latter in 1971 agreed to assign all the assets and liabilities of the Karachi branch and Chittagong subbranch of Bank of China ("BOC") to the Government of Pakistan (R 60). Both the Karachi branch and Chittagong subbranch of BOC had at all times remained loyal and subject to the direction of BOC on Mainland China. The PRC designated the Karachi branch of BOC, and the Government of Pakistan designated the National Bank of Pakistan to consummate the agreement and transfer. The two said banks thereafter signed an agreement dated August 17, 1971 memorializing the directive of the agreement entered into between the two sovereign states, whereby all assets, as well as debts and undertakings of the said BOC branch and subbranch, were assigned to NBP (R 61-62).

The total assets and liabilities transferred (R 598-601) included credit balances being held at Bank of China, New York Agency, for the Karachi branch in the amount of $546,123.20, and for the Chittagong subbranch in the amount of $96,252.18. Those sums had been "blocked" as assets of the PRC, first by "BOC" Taipei's own instructions in 1950, and then by this government under the Foreign Assets Control Regulations issued pursuant to the Trading with the Enemy Act (50 U.S.C. App. Section 1).

"BOC" Taipei had been formed by only two of the then twelve directors of BOC. Those two had fled to Formosa, had their authority revoked by BOC, and the Taipei opera-

tion became licensed in Taiwan only in 1960. In 1971, the Taiwanese legislature formed a new bank, ICBC (R 534-546). ICBC was thus a creation of statute and not a "name change" from BOC. At no time did the Karachi branch and Chittagong subbranch or NBP ever acknowledge any authority of "BOC" Taipei, or of ICBC, after its statutory creation. The said credit balances were at all times property of BOC Peking to which the said Karachi branch and Chittagong subbranch had expressed allegiance, and as such, BOC Peking could do whatever it chose with its property, as the lower Court correctly held. ICBC wants this Court to consider that the lower Court should have ruled that the PRC and BOC Peking could not do what it wanted with its assets, at least in New York.

ICBC, on page 4 of its petition, admits that the Regulations blocked "any transfer of assets in this country in which the PRC claimed an interest," but, the "FAC regulations aside", that ICBC always felt that the fund belonged to it. Here, again, is evidence of the lack of a serious argument. ICBC and its alleged predecessor, "BOC", New York Agency, blocked, and for thirty years reported the fund to the U.S. Treasury as property in which the PRC and/or its nationals had an interest, which constitutes a fatal admission by ICBC that the monies were indeed assets of the PRC or its national, mainly, BOC Peking. To allege that these assets were property of Taiwan, yet block them for three decades as PRC assets, defies reasonable explanation. Taiwan was never on an enemy list, and to block Taiwanese assets was illegal. The blocked funds were reported in sworn statements to the U.S. Treasury (R 74-79), and "BOC", New York Agency and ICBC never once in thirty years applied for a routine unblocking on the alleged basis that the property was an asset of Taiwan. There is no sensible reason why ICBC would block its own assets.

This is a simple case of conversion and confiscation of assets of a branch and subbranch and, thus, assets of the head office in Peking to which that branch and subbranch were loyal. BOC Peking certified that the fund is property of NBP by valid assignment (R 72), and, thus, an unbroken chain of title rests with NBP. Even if the assignment were voided, as ICBC recommends, that would merely mean that BOC Peking would have title to the fund. In no manner imaginable could title ever be placed with ICBC. The questions presented by ICBC cannot explain its and "BOC", New York Agency's own undeniable actions over thirty years duration, acknowledging the property as assets of the PRC or its national; nor can those questions alter this case into anything other than a straight-forward conversion action governed by state law.

REASONS FOR DENYING THE WRIT.

1. Jurisdiction should be refused as an adequate, independent state ground exists for the decision below

Notwithstanding NBP's denial of the validity of any of ICBC's alleged federal defenses, it is well settled that this Court will decline from review on certiorari if a non-federal ground is independent and adequate to support the judgment, despite the presence of federal grounds. *Fay v. Noia,* 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837 (1963); *Jankovich v. Indiana Toll Road Commission,* 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439 (1965). Jurisdiction to review on certiorari will be taken only if the federal ground was the *sole* basis for the decision. *Dept. of Mental Hygiene of California v. Kirchner,* 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753 (1965), *on remand,* 43 Cal. Rptr. 329, 400 P.2d 321 (1965).

This Court does not have to find conclusively that the decision was based on state grounds to decline jurisdiction. It may so refuse even where the question of the existence of an adequate state ground is debatable. *Stembridge v. Georgia,* 72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130. It may also refuse to take jurisdiction if a state Court's decision might have rested on a non-federal ground, for example, where no opinion was written by the last state appellate Court to review the matter, as in this case. *Ellis v. Dixon,* 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, *reh. den.* 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759.

The lower Court properly traced title to the funds from the said branch and subbranch to BOC Peking to NBP (Appendix to petition, "A"-11 to A-13). As that Court correctly held, "ICBC's contention that the BOC offices in Chittagong and Karachi should be treated as branches of BOC-Taipei is unsupportable" (A-12). Refusal to surrender the fund on demand, which was made as soon as the U.S. government blockage was lifted, constitutes a conversion. The substantive law of the State of New York governs that tort, and was the basis for the decision. The lower Court's discussion of ICBC's alleged federal defenses was not essential to the findings of fact and conclusions of law upon which the decision rested.

The decision could therefore have been rendered without deciding the alleged federal questions, which were not necessary for a determination. Jurisdiction should therefore be declined. *Wilson v. Cook,* 66 S.Ct. 663, 327 U.S. 474, 90 L.Ed. 793; *Harding v. Illinois,* 25 S.Ct. 176, 196 U.S. 78, 49 L.Ed. 394. The basis for the decision below is adequate and independent of any alleged federal grounds.

2. No substantial federal question has been presented

A federal question is not "substantial" if it is without merit or foundation, is wholly a matter of conjecture, rests upon false assumptions, is not debatable, or requires no analysis. *Ennis Waterworks v. Ennis,* 34 S.Ct. 767, 233 U.S. 652, 58 L.Ed. 1139; *Abrams v. Van Schaick,* 55 S.Ct. 135, 293 U.S. 188, 79 L.Ed. 278; *Parker v. McLain,* 35 S.Ct. 632, 237 U.S. 469, 59 L.Ed. 1051; *Hamilton v. Regents of University of California,* 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, *reh. den.* 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

The lack of substance to ICBC's alleged federal questions is readily discernible. According to ICBC, the New York Court's decision, in a single sweep, nullified both the Taiwan Relations Act ("TRA") and the FAC Regulations, rejected federal law, interfered with Congressional powers, perverted the act of state doctrine, and challenged "all the business conducted, financial transactions had and judgments entered" for the three decades in which the PRC was not recognized (petition, pages 10-12).

Despite our numerous readings of the decision, we still fail to envision any of those consequences, and the Appellate Division and the Court of Appeals agreed.

Taiwan or any of its nationals are in no manner imaginable, harmed by the decision. No legal rights of any Taiwanese individual or entity have been infringed upon. No judgment in favor of Taiwan or its nationals and no financial transaction with any Taiwanese individual or corporation predating recognition of the PRC has in any way been upset or placed in jeopardy. ICBC states that the New York Court "rejected" the TRA, yet all that the TRA protects is the right to collect the 1953 judgment in *Bank of China v. Wells Fargo Bank & Union Trust,* 92 F.Supp. 920 (N.D. Cal.

1950), *appeal dismissed and remanded,* 190 F.2d 1010 (9th Cir. 1951), *on remand* 104 F.Supp. 59 (1952), *aff'd in part, rev'd in part,* 209 F.2d 467 (1953). The TRA does not compel a decision similar to *Wells Fargo* when dealing with other property not the subject of prior suits and claimed by other parties. Using ICBC's novel interpretation of the TRA, any Taiwanese national is automatically immune from all suits, and anyone having a claim against such national would be deprived of right without due process. The TRA was not intended to be a permanent bar against suing any Taiwanese entity for all time to come. The question of the effect of the TRA is a non-issue. The TRA in this case prevents a vacature of the *Wells Fargo* judgment and nothing more. That judgment was never challenged by the New York Court.

In *Wells Fargo,* no issue was fully litigated because BOC Peking was not a party. Although it tried to intervene, and its application reached the Ninth Circuit, it was denied standing in that suit to litigate its claim to the deposit in Wells Fargo Bank, since BOC Peking was a national of an enemy state, all of whose assets were frozen, and against whom the U.S. was at war in Korea. Despite ICBC's misinterpretation, legal entitlement to all property of BOC in the U.S., present and future, was not reached in *Wells Fargo,* nor could it have been reached as that decision applied only to the fund in suit (104 F.Supp. at 66). That Court based its decision, by its own words, solely on our Executive's recognition of Taiwan (104 F.Supp. at 66). It explicitly stated that by placing the fund in the "hands of the new management of the Bank of China, the 'People's Government' would be aided and abetted" (92 F.Supp. at 924).

Deciding in favor of BOC Peking would thus have resulted in aiding and abetting an enemy in wartime even if that enemy were legally entitled to the fund. Because of wartime conditions, national policy, and the fact that non-

recognized governments are generally not permitted to use our Courts, BOC Peking was denied standing.

Significantly, ICBC never used *Wells Fargo* to apply for unblocking of the subject fund, but now seeks to have that judgment given collateral estoppel effect, when that decision acknowledged political considerations in time of war, when BOC Peking was not a party and could not fully litigate its claim, when the said branch and subbranch of BOC were not parties, when NBP was not a party, when ICBC was not a party (nor even in existence until 1971), when the issues are anything but identical, and when law and circumstances have changed 180 degrees.

Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938), relied on by ICBC, upholds the principle, never at issue here, that prior judgments remain valid notwithstanding a change in recognition status. The *Wells Fargo* judgment was not invalidated by the lower Court. It could not apply collateral estoppel treatment simply because the issues were not identical to those in this case (A 16) and not because of a "change in recognition policy," as ICBC asserts.

No conflict exists between the New York Court decision and *Guaranty Trust.* Likewise, no problem arises between the decision and *Kennett v. Chambers,* 55 U.S. 38 (1852), cited by ICBC, wherein the Court refused to enforce a contract designed to aid Texas in its war with Mexico. Although Texas had declared independence at the time the contract was entered into, our government did not recognize it and considered it still officially part of Mexico with which we were at peace. The Court was obliged to regard Texas as part of Mexico until the Executive determined otherwise. There is no conceivable conflict with the decision below.

The allegation that the decision "nullified" the FAC Regulations presents no valid federal question. The Regulations do not empower a judge to void a foreign agreement absent jurisdiction over the parties. It is elementary that a Court can issue orders only with respect to matters over which it has jurisdiction. Neither the PRC, the Government of Pakistan, BOC Peking, or NBP Karachi, the parties to the said various agreements, were persons subject to U.S. jurisdiction. Our government could temporarily block a transfer of funds in the U.S., but the foreign assignment itself was not subject to review in any Court. ICBC's case citations are not to the contrary. *Dames & Moore v. Regan et al.*, 453 U.S. 654 (1981), involved various regulations by which the Executive nullified liens on Iranian assets, and centered around the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 *et seq.* Executive Orders Nos. 12170 and 12205, issued under 50 U.S.C. Section 1701 prohibiting certain transactions and activities, by their very terms apply only to "any person subject to the jurisdiction of the United States."

Likewise, *Propper v. Clark*, 337 U.S. 472 (1949), relied on by ICBC, concerned activities by persons subject to U.S. jurisdiction, including ASCAP, and plaintiff therein, as receiver.

In *Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460 (2d Cir. 1971), cited by ICBC, the transfer entered into by Cheng was done so through his capacity under a power of attorney to represent and handle his father's New York estate, and he was thus a person subject to U.S. jurisdiction, having utilized the New York Surrogate Court as well.

The decision below does not conflict with any of ICBC's authorities. The matter of jurisdiction over the parties is so

fundamental that ICBC's argument does not require debate or further analysis. ICBC wished the lower State Court to usurp powers unheard of by any Court in our history, and declare a foreign soverign-to-foreign sovereign agreement followed by a foreign bank-to-foreign bank agreement null and void, all in a vain attempt to escape the consequences of its own conversion of monies belonging to NBP.

No substantial federal question is posed with respect to the act of state doctrine, which the New York court correctly applied. The takeover of BOC's majority interest by the PRC, and the agreement between two sovereign nations, eventually resulting in the transfer of the Karachi branch and Chittagong subbranch of BOC, are acts of state beyond the consideration of a New York court. Whether the foreign agreement concerned, in part, property in the U.S. is irrelevant, as the agreement as a whole is outside of judicial review. Likewise, the Court cannot question the designation by the Government of Pakistan of NBP as the entity to succeed to the assets and liabilities of BOC's said branch and subbranch. Acts of a foreign sovereign, whether or not that government is recognized, cannot be questioned in these courts and are presumed to be valid. *United Bank v. Cosmic International Inc.*, 542 F.2d 868 (2d Cir. 1976); *Zweibon v. Mitchell*, 516 F.2d 594, 170 U.S. App. D.C. 1 (1975), *cert denied, Barrett v. Zweibon*, 96 S.Ct. 1684, 425 U.S. 944, 48 L.Ed.2d 187. ICBC is itself trying to negate the legitimate application of the doctrine so that a lower state court judge could review the merits of an agreement consummated between two foreign governments.

The decision does not conflict with ICBC's authority, *Bandes v. Harlow & Jones Inc.*, 852 F.2d 551 (2d Cir. 1988). That case involved acts of expropriation and confiscation which sought to be applied extraterritorially, and were "shocking to our sense of justice" (852 F.2d at 667). Here, no nationalization occurred upon the PRC's takeover

of BOC's majority interest, and the rights of private shareholders, as determined by the *Wells Fargo* Court, were not denied (104 F.Supp. at 65). At issue is an executed assignment pursuant to an agreement between two friendly foreign governments.

Finally, ICBC alleges that the decision allows enemies to evade the FAC Regulations by means of foreign assignment agreements. No such ruling or effect appears in the decision. Foreign sovereign states and nationals are free to and will enter into any transaction they wish, whether or not the decision below stands. ICBC wants the Court to prevent foreign governments from dealing with their own property in the U.S.

ICBC has presented no substantial federal question warranting consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 14, 1989

Respectfully submitted,

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